IN THE HIGH COURT OF JUDICATURE AT BOMBAY
APPELLATE SIDE
Civil Writ Petition No.5280 of 1990

(1) Shri Prakash Vishnupant Tile

(2) Shri Vishwamber Vishnupant Tile
Since deceased through LR:
(a) Vijendra Madhukar Tile Petitioners

Vs.

Ramchandra Ganesh Pathak
Since deceased through his LRs.

(1) Smt.Indirabai Ramchandra Pathak
(2) Shri Ramesh Ramchandra Pathak
(3) Shri Umesh Ramchandra Pathak
(4) Shri Pandit Ramcharda Pathak

(5) Shri Sharad Ramchandra Pathak
since deceased through his LRs.
(a) Smt.Suvarna Sharad Pathak
(b) Shri Nandkumar Sharad Pathak
(c) Sumati Sharad Pathak Respondents

Mr.V.S.Gokhale for petitioners.

Mr.S.R.Page for respondents.

CORAM: B.H.MARLAPALLE, J.

June 14, 2007.

ORAL JUDGMENT :

1. This writ petition filed under Article 227 of the Constitution impugns the judgment and order rendered by the lower Appellate Court in Civil Appeal No.1258 of 1986. The said appeal was allowed and the

decree of eviction passed by the learned Principal Judge, Small Causes Court at Pune in Civil Suit No.91 of 1979 filed under the Bombay Rents, Hotel and Lodging House Rates Control Act, 1947 (for short "the Bombay Rent Act") on 30/8/1986.

2. The appellants-plaintiffs are the landlords and the eviction decree was sought on three grounds viz. (a) default in payment of rent with permitted increases, (b) bona fide requirements and (c) change of user and breach of the terms of tenancy agreement.

. The landlords had contended that the monthly rent was Rs.65/-, in addition the permitted increases like education cess, employment guarantee cess and taxes etc. were also required to be borne by the defendant-tenant and he was in arrears of the same from 4/2/1977 onwards. It was also stated that for the month of November 1978 the monthly rent of Rs.65/- was not paid and all these arrears were demanded by issuing a demand notice (Exhibit 66) dated 1/12/1978 by registered post A.D. The said notice was received by the defendant on 7/12/1978 (postal receipt at Exhibit 67). The suit shop premises admeasuring 25 ft. x 13 ft. located on the

ground floor of CTS No.405, Budhwar Peth, Pune were given on rent in the year 1951 to one Mr. Agarwal who was paying rent at the rate of Rs.35/- per month and rent was thereafter increased to Rs.55/- per month and the said amount of Rs.55/- was increased to Rs.65/- per month. The defendant was occupying the premises since 1959. The defendant filed his Written Statement at Exhibit 10 and additional written statement at Exhibit 38 and contended that initially he was paying the rent of Rs.45/- per month and subsequently it was increased to Rs.65/- per month and the same was excessive and unreasonable. He denied that he was in arrears of education cess or employment guarantee cess and that he was in arrears of Rs.207/-. In the alternative he contended that he had already sent money order for Rs.207/- to the plaintiffs but they refused to accept the money order and, therefore, he could not be said to be in arrears. On behalf of the plaintiffs, Prakash Vishnupant Tile was examined and in addition Vishwamber Tile and Manohar Tile were examined. In support of the defendant's case, he was examined. The trial Court on assessment of the evidence and by taking into consideration the averments made by the respective parties rejected the landlords' case for

eviction on the grounds of bona fide requirements and change of user. However, the trial Court decreed the eviction on the ground of default in payment of rent and permitted increases. However, the lower Appellate Court while holding that the case of the landlord for eviction of the decree as per the trial Court was under Section 12(3)(a) of the Bombay Rent Act, held that in the notice at Exhbit 66 as well as in the plaint there was no reference to agreement of monthly payment of rent or permitted increases and the decree passed by the trial Court was set aside.

3. The trial Court noted that apart from there being a statutory liability of the tenant to pay the educational cess and the employment guarantee cess, the plaintiffs had produced on record the counterfoil of the rent receipt for the year 1975 which was signed by the defendant and the same was admitted by the defendant while in the witness box. It showed that in addition to the rent the defendant had paid the education cess separately to Smt. Parvatibai Joshi and this document clearly went to show that in addition to the monthly rent the defendant had agreed to pay education cess and the employment guarantee cess and he was so paying separately. Section 12(3)

of the Bombay Rent Act came to be amended by Maharashtra XVIII of 1987 and in the instant case we are concerned with the pre-amended clause (a) of sub-section (3) of Section 12 of the said Act. The pre-amended Section 12(3)(a) reads as under :

> "Where the rent is payable by the month and there is no dispute regarding the amount of standard rent or permitted increases, if such rent or increases are in arrears for a period of six months or more and the tenant neglects to make payment thereof until the expiration of the period of one month after notice referred to in sub-section (2), the Court may pass a decree for eviction in any such suit for recovery of possession."

There is no dispute that in the instant case after the suit was filed at not point of time the defendant had deposited the arrears as claimed by the suit notice at Exhibit 66. The lower Appellate Court referred to the decision of this Court in the case of Awabai Muncharji Cama & ors. vs. M.N. Kaka **[72 Bom. R.C. 1986]**. It needs to be noted that in the notice or in the agreement there was nothing to

believe that the rent was payable on monthly basis. Mr.Page, the learned counsel for the tenant relied upon yet another decision of this Court in the case of Bablu @ Jagdishsingh v. Ladharam M. Mirchandani **[1977 Bom.L.R. Vol.80 p. 310]** wherein this Court, inter alia, by referring to the scheme of Section 12(3)(a) of the Bombay Rent Act held as under :

> "The above provisions clearly show that if the rent, which includes education cess, is payable by the month and there is no dispute regarding the amount of the education cess, which is a permitted increase, then the tenant must face a decree for eviction if he has neglected to make payment thereof within one month after the notice given under sub-s. 2 of s.12. If however, education cess is not payable by the month, then the provisions of s. 12(3)(a) of the Bombay Rent Act will not be applicable at all."

. In the instant case, as noted earlier, on the counterfoil of 1975 the defendant had signed and it clearly indicated that over and above the monthly rent the statutory permitted increases like the

education cess and employment guarantee cess were being paid by him. In the Written Statement filed by the defendant at Exhibit 10 he admitted the monthly rent of Rs.65/- but claimed that it was illegally being charged. He also admitted that he had received the suit notice for the arrears of Rs.207/- and took the defence that he had sent a money order. As noted by the trial Court, he could not bring on record any documentary evidence in support of these contentions. Money order form returned by the postal authorities or money order form slip could have been produced on record. The defendant stated in support of his failure to do so that the same was lost or misplaced. Thus he could not prove the defence he had taken and, therefore, this impliedly shows that he had accepted the liability of payment of Rs.207/- by way of arrears which also included the amount of education cess and the employment guarantee cess.

4. Mr.Gokahle, the learned counsel for the petitioners-landlords rightly relied upon the following two decisions rendered by the Apex Court:

(i) Raju Kakara Shetty Vs. Ramesh Prataprao Shirole & anr. **[(1991) 1 SCC 570]**, and

(ii) Hotel Kings & ors. Vs. Sarafarhan Lukmani & ors. **[(2007) 1 SCC 202]**.

. In the case of Raju Shetty (Supra) a three-Judge Bench of the Apex Court held that the payment of education cess under the Maharashtra Education (Cess) Act, 1962 is the liability of the landlord to pay annually but the landlord has a right to recover the amount so paid from his tenant in addition to the standard rent and the said amount will fall within the ambit of "permissible increases" within the meaning of Section 5(7) of the Bombay Rent Act. It further held that failure to make payment of these permitted increases would fall within the ambit of Section 12(3)(a) of the said Act.

. In the case of Hotel Kings and ors. (Supra) the said view has been reiterated by holding that even though the lease deed contained a provision for payment of the rates and taxes exclusively by the lessee and it is also stipulated that the lessor will have no liability therefor, the lease will still be governed under Section 12(3)(a) of the Bombay Rent Act and the statutory payments like education cess

and the employment guarantee cess would fall within the ambit of "permitted increases".

5. Having regards to the evidence as available on record led by both the parties, the landlord was successful in proving that he was entitled for a decree under Section 12(3)(a) of the Bombay Rent Act and the reasoning set out by the lower Appellate Court in setting aside the said decree is unsustainable. In fact the reasoning given by the lower Appellate Court on this issue is as cryptic as it could be and even factually wrong. In the Advocate's notice at Exhibit 66 it was clearly stipulated that there was an agreement for payment of rent on monthly basis at the rate of Rs.65/- per month and in addition the tenant was liable to pay the education cess and the employment guarantee cess. The same was reiterated in the plaint by the plaintiffs. It is, therefore, obvious that the lower Appellate Court fell in manifest error on reading the evidence and in fact recorded a finding contrary to the evidence on record. It also fell in grave error in interpreting the provisions of Section 12(3)(a) of the Rent Act and in appreciating the law laid down by this Court in the case of Awabai Muncharji (Supra).

6. The arguments advanced by Mr.Gokhale on the point of bona fide requirements cannot be considered for the simple reason that the decree passed by the trial Court was not challenged by the landlords and they had not preferred even a cross appeal before the lower Appellate Court. Under these circumstances, the lower Appellate Court was justified in rejecting the application by the landlords for bringing on record additional evidence in support of the landlords' case for bona fide requirements.

7. In the result, this petition succeeds and the same is hereby allowed. The judgment and order rendered by the learned 8th Additional District Judge at Pune in Civil Appeal No.1258 of 1986 on 28th September 1990 is hereby quashed and set aside and the decree of eviction passed by the learned Principal Judge of the Small Causes Court on 30th August 1986 in Civil Suit No.91 of 1979 is hereby confirmed. Rule is made absolute accordingly with no order as to costs.

(B.H.MARL